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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/623,489	07/18/2003	Josh Schreider	PA5311	4579
30448	7590	12/19/2007	EXAMINER	
AKERMAN SENTERFITT			THAKUR, VIREN A	
P.O. BOX 3188			ART UNIT	PAPER NUMBER
WEST PALM BEACH, FL 33402-3188			1794	
			MAIL DATE	DELIVERY MODE
			12/19/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/623,489	SCHREIDER, JOSH	
	<b>Examiner</b>	<b>Art Unit</b>	
	Viren Thakur	1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 31 October 2007.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1 and 8-12 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1 and 8-12 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on October 31, 2007 has been entered.

### ***Response to Arguments***

2. Applicant's arguments with respect to claims 1-4 and 8-12 have been considered but are moot in view of the new ground(s) of rejection.

### ***Claim Rejections - 35 USC § 103***

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:
1. Determining the scope and contents of the prior art.
  2. Ascertaining the differences between the prior art and the claims at issue.
  3. Resolving the level of ordinary skill in the pertinent art.
  4. Considering objective evidence present in the application indicating obviousness or nonobviousness.
5. **Claims 1 rejected under 35 U.S.C. 103(a) as being unpatentable over Atwell (US 6561784) in view of Wetzel's Pretzels and in further view of, KrispyKreme, Pretzel Time, Recipe Kitchen, Jindra et al. (US 6528104) and Rooney et al. (US 6242021).**

Regarding instant claim 1, Atwell teaches two or more dough compositions (Column 4, Lines 18-22) and further teaches wherein a different dough is used to fill the hole formed when the first dough composition is shaped (Column 4, lines 44-52). Atwell teaches using cake and bread dough compositions, such as pretzels (Column 1, line 13 and lines 17-20). Thus, Atwell teaches pretzel dough and also teaches that other cake and bread dough products can be used. Atwell also teaches that the shape of the food product can have a shape other than a toroid (Column 4, lines 54-57) and the apparatus used to shape the dough can comprise different shapes to vary the look and shape of the product (Column 1, lines 27-34). Regarding the first dough member having a first end and a second end, figure 2 shows a first dough member having a first and second end as a result of the change in the dough composition to the second dough

composition. It is noted that the end of first and second end of the dough can also be interpreted to be the top and bottom sides of the dough. Although ends can be seen in Figure 1 of applicant's drawings, it is noted that the first elongated dough member does would only appear to have ends (22 and 24) prior to shaping into the desired configuration. When the elongated dough is shaped, the ends appear to be pinched into the rest of the dough member.

The claims differ in the particular shape of the first dough member and the first dough member having a plurality of open spaces.

As discussed above, Atwell teaches that one of the dough compositions can be that of a pretzel and further teaches that other shapes can be used. Wetzel's Pretzels is relied on to teach the conventionality of pretzels having an elongated dough member having a first and second end, with a plurality of open spaces (See Page 2 of 3, item next to 1991). Therefore to shape the first dough of Atwell, which can be a pretzel, into a conventional pretzel shape having three openings, would have been a matter of choice to one having ordinary skill in the art depending on the shape desired for the pretzel.

Atwell already teaches placing the second dough member within an open space within the first dough member but the claim further differs in the second dough member having a cinnamon bun dough composition and being formed into a spiral configuration.

Berry is relied on to teach the conventionality of cinnamon bun dough having a spiral configuration (See page 386 – Cinnamon Rolls, step 4). Furthermore, Wetzel's Pretzels, Pretzel Time, Recipe Kitchen and KrispyKreme are relied on to teach the

conventionality of the combination of a cinnamon bun flavor with that of a secondary product. It is noted that Berry teaches using cinnamon and sugar sprinkling on the dough prior to rolling into spirals (See Step 4). To one having ordinary skill in the art, it would have been obvious that this provides the cinnamon roll with the distinctive cinnamon and sugar flavor (in combination with the glaze). Additionally, Wetzel's Pretzels teaches a cinnamon bun flavored pretzel (See page 2 of 3, "Cin-A-Yum" pretzel), Pretzel Time Products and Recipe Kitchen teach pretzels having a cinnamon and sugar flavor and KrispyKreme teaches a doughnut having a cinnamon bun flavor (using cinnamon and a glaze). Jindra et al. is cited as evidence of the conventionality of combining a sweet flavor such as apple cinnamon with a pretzel (Column 13, line 56; and Example VII on column 17). Thus, the prior art teaches that it has been conventional to combine the flavor of a cinnamon but with that of another product, such as a pretzel. Furthermore, based on Atwell's teaching of combining different types of dough by filling the hole of the first dough product with a different dough composition, and since the prior art teaches the combination of a cinnamon roll flavor with another flavor such as a pretzel flavor, it would have been obvious to one having ordinary skill in the art to use cinnamon flavored dough with the product of Atwell to achieve the result of the combined flavor of a pretzel with that of a cinnamon roll.

Rooney et al. is relied on as further motivation for combining a pretzel flavored composition with a contrasting food substance (See Abstract and column 2, lines 35-40). The prior art teaches combining a pretzel flavor with a cinnamon roll flavor, i.e. two contrasting flavors, and Rooney et al. provided additional motivation to combine the

flavors such as a pretzel in combination with a sweet flavored food for the purpose of achieving contrasting flavors. The combination of contrasting flavors would have been well known to the ordinarily skilled artisan. Other examples would include a trail mix that includes pretzels with chocolate such as M&M<sup>®</sup> candy and Chex<sup>®</sup> snack mix. Therefore to combine the pretzel dough of Atwell with another contrasting dough such as cinnamon bun dough would have been obvious since the art teaches that it has been conventional to combine these flavors for the purpose of providing a contrasting taste. It is noted that the prior art, such as Pretzel Time, Wetzel's Pretzels and Recipe Kitchen also teach this contrasting flavor by adding sweet ingredients such as cinnamon and sugar to a pretzel.

**6. Claims 8-12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Atwell (US 6561784), Wetzel's Pretzels, KrispyKreme, Pretzel Time, Recipe kitchen and Rooney et al. (US 6242021) as applied to claim 1 above, and in further view of Tepper et al (US 20040126462 A1).**

The prior art is taken as cited above.

Regarding instant claims 8-12, the claims add third and fourth elongated dough members within a second and third open space of the first elongated dough member. Since the combination of the prior art teaches placing a second dough composition within an open space of the first dough composition, to duplicate the arrangement and place a third and fourth dough member having a spiral configuration into the remaining open spaces of the first dough member would not have provided a patentable feature

over the prior art, since the art has already taught it conventional to place a second dough member having a different composition than that of the first dough member within an open space of the first dough member.

Tepper et al. is also relied on as further evidence of the conventionality of placing a multiple of spiral shaped food products within a plurality of open spaces within a first food product. Tepper et al. is also relied on to teach that the spiral shaped food products placed within the open space of the first food product can take different arrangements, as shown by figures 1, 4, 7, 9 and 12.

### ***Double Patenting***

7. Claims 1 and 8-9 of this application conflict with claim 1 and 8-9 of Application No. 10642541. 37 CFR 1.78(b) provides that when two or more applications filed by the same applicant contain conflicting claims, elimination of such claims from all but one application may be required in the absence of good and sufficient reason for their retention during pendency in more than one application. Applicant is required to either cancel the conflicting claims from all but one application or maintain a clear line of demarcation between the applications. See MPEP § 822.

8. A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).



A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

9. Claims 1 and 8-9 are provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 1 and 8-9 of copending Application No. 10642541.

This is a provisional double patenting rejection since the conflicting claims have not in fact been patented.

### ***Conclusion***

10. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. US 1855145 discloses combining two food compositions, such as a chocolate bar and a coconut bar. The reference also discloses that the food bar can comprise cake. US 2463112 discloses in figure 24 dough compositions comprising two different dough compositions combined together. US 5312633 discloses pretzel dough stuffed with another food product. US 2924330 teaches cinnamon bun products that use pretzel elements to hold the bun together. US5518746 discloses making composite food products wherein one food product is placed on top of another food product. GORP – Food – Good Old Raisins and Peanuts is cited to teach trail mix comprising pretzels and chocolate. GoogleGroups is cited as evidence of mixes that comprise sweet and savory components.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Viren Thakur whose telephone number is (571)-272-6694. The examiner can normally be reached on Monday through Friday from 8:00 am - 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Carol Chaney can be reached on (571)272-1284. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Viren Thakur  
Examiner  
Art Unit: 1794



Steve Weinstein 1794